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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF RCN CORPORATION

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August 27, 1999

SUMMARY

RCN, whose business plan is virtually a living illustration of the convergence of several communications services using one advanced distribution technology, urges the Commission to develop inside wiring policies and rules that express an overarching policy to compel those who own or operate inside wiring or the facilities or spaces in which such wiring is or can be installed, to make such wiring or facilities available on reasonable, nondiscriminatory, and equitable terms to all service providers regardless of the technology used or the regulatory category under with the provider operates. As suggested in the Notice of Proposed Rulemaking, RCN recommends that the Commission establish the overarching inside wiring policy via a federal mandatory access requirement (the "FMAR"). This requirement should apply to incumbent local exchange carriers, incumbent cable operators, building owners or managers, and public utilities who own, operate, or control facilities within multiple tenant environments ("MTE"). The FMAR should be preemptive of contrary, conflicting, or inconsistent state law, although states should be free to supplement the FMAR to meet local conditions or concerns. The FMAR should also supersede any current Commission rules that would frustrate its purpose.

Rather than attempt to tailor the existing telephone inside wiring rules to the cable inside wiring rules, or to construct elaborate, complex but inevitably incomplete rules, as the Commission has done in the case of cable inside wiring, RCN suggests that initially the FMAR simply articulate three fundamental and interlocking principles along with basic implementing rules. Later, in subsequent stages of this proceeding, the Commission can consider and refine specific regulations. This approach will refocus and reorient all parties on basic principles, but will also provide flexibility for the industries involved to develop new approaches to reach MTE end users.

In essence, these rules should reflect the following three principles:

- **End - User Principle**: MTE end-users should have a right to receive communications services from any entity that is willing to provide such service and has been properly certificated by duly constituted authority;

- **Services Provider Principle**: Entities wishing to serve MTE end-users, and who have the proper certification, should be able to do so either by the payment of a nondiscriminatory and reasonable fee to the owner of any existing inside wiring, facilities, conduits, or rights of way, or by installing new distribution facilities pursuant to agreement with the MTE owner/manager; and

- **MTE Owner Principle**: MTE owners should be obliged to provide building access to all duly certificated entities wishing to serve end-users, on nondiscriminatory and reasonable terms and conditions.

RCN urges the Commission to act swiftly in adopting these broad inside wiring principles. The 30 percent of residences, small businesses, home offices and other end-users who need access to modern telecommunications and are located within MTEs are currently not receiving the full benefits of the "emergence of convergence." As the U.S. economy becomes more service-oriented, and as telecommuting becomes more common and more important to the growth of the economy, it is vital for the Commission to establish a broad preemptive federal policy so as to assure that end-users located in MTEs benefit as fully as others from the pro-competitive national telecommunications policy.

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COMMENTS OF RCN CORPORATION

RCN Corporation ("RCN"), one of the nation's newest and most innovative participants in the telecommunications industry, hereby submits its Comments in the above-captioned matter. In these proceedings, the Commission seeks industry views on a wide variety of issues concerning the provision of service to end-users in multiple tenant environments ("MTEs"). RCN, which offers a bundle of local exchange, long distance, high-speed Internet access and broadband video service to its subscribers, is pleased to offer its perspective on this issue of

continuing importance to the public and to the communications industry. Indeed, overcoming the barriers that RCN has encountered in providing its services to end-users within MTEs is one of its principal corporate goals. The Commission is to be commended for its thorough and thoughtful Notice of Proposed Rulemaking ("NPRM") and Notice of Inquiry ("NOI").

Cable providers as well as telecommunications providers require Commission assistance to reach MTE end-users. With the enactment of the 1996 Act and advances in technology, more and more companies are becoming integrated providers – providing cable, telephone, video and other communications services in a bundled package. Thus, in its comments RCN not only urges the Commission to adopt new rules that provide for access to MTEs by competitive providers, but also recommends that these new access rules encompass both Title II and Title VI entities so that integrated providers are governed by one body of law. The current Commission inside wiring rules in Parts 68.213, 68.215 and Parts 76.800-76.806 should remain effective to the extent they do not impair or contradict the rules adopted in this proceeding.

While there are substantial differences between Title II telecommunications carriers and Title VI video service providers, it is a fundamental fact of modern technology that the "emergence of convergence" as articulated recently by the Chief of the Cable Services Bureau[1/] is increasingly the linchpin of virtually all Commission regulation. In its comments, RCN stresses the need for the Commission to recognize this "emergence of convergence" when

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[1/] FCC News, July 22, 1999.

formulating building access rules. With a significant segment of the population being denied an opportunity to participate in this "emergence of convergence," the Commission's goal must be to articulate anew the fundamental principles for the 30% of end-users who live or work in MTEs.

I. INTRODUCTION

RCN, together with its subsidiaries and affiliates, is unique among new competitors in the telecommunications marketplace in a number of respects. RCN is building its own network based on state-of-the-art fiber optic facilities, a network that has been described by one outside source as "one of the most advanced in the world."[2/] RCN's optical fiber network will permit it to compete at once with incumbent local exchange carriers ("ILECs"), long distance carriers ("IXCs"), Internet service providers ("ISPs") and cable companies.[3/] RCN's technology offers a bundled arrangement of several services, each of which is currently regulated differently.

Unlike most competitive entrants, RCN seeks to serve principally the residential, rather than the commercial market. RCN's business strategy encompasses the bundled provision of four categories of service, rather than just one or two. RCN seeks to provide video distribution

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[2/] Morgan Stanley Dean Witter Report, March 31, 1999. RCN has been rated # 2 out of 100 of the most innovative telecommunications companies in America. *See* Forbes ASAP Dynamic 100 List, April 5, 1999.

[3/] RCN's fiber optic distribution plant is vastly superior in quality and in bandwidth to that of most current cable systems and telephone local distribution plant. Its network provides 860 MHz of bandwidth, passing 150 homes per node. In most cases, its fiber is 900 feet or less from homes. ILEC provision of local loops on fiber is extremely rare. Cable systems generally provide service over coaxial cable with a bandwidth of 550 MHz or less, and serve 500-5000 homes per node. RCN's network is also superior to traditional coaxial cable networks because it contains switching architecture for telephony, contains fewer electronic components, and is more easily maintained, scaled to local demand, and more reliable.

services, high-speed Internet access, local exchange telephone and long distance telephone services to its subscribers.

In the telecommunications market, RCN began operations as a reseller but is rapidly moving to facilities-based services. It is certificated as a common carrier in numerous states and is currently offering service in Massachusetts, New York, Pennsylvania and the District of Columbia. In each of these states it provides long distance service along with local exchange telephony. In the Internet market, RCN is the 7th largest ISP in the U.S. and the largest regional ISP in the northeast corridor. In the video market, RCN has chosen to operate wherever possible as an open video system ("OVS") operator, and has been so certified by this Commission for operation in several metropolitan areas. RCN has been operating OVS facilities in Boston and a number of Boston's suburban communities, in New York City and in Washington, D.C. It is negotiating OVS agreements with local franchising authorities in numerous suburban communities clustered around these major urban areas and in the Philadelphia urban area. RCN has also entered into traditional Title VI cable franchise agreements in many communities. In sum, RCN operates under many different regulatory regimes, and inconsistencies in regulations governing inside wiring impede the provision of RCN's innovative, bundled services.

II. INABILITY TO GAIN ACCESS TO MDU INSIDE WIRING

Some 30% of U.S. homes are contained within multiple dwelling units ("MDUs") according to recent Congressional testimony.[4/] In its NPRM and NOI, the Commission relies on

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[4/] Testimony of John Windhausen of ALTS on May 13, 1999 before the House Subcommittee on Telecommunications, Trade and Consumer Protection, transcript at 27. *See also*

a figure of 28%.[5/] End-users, whether business or residential, who are located in MTEs or MDUs are almost always less expensive to serve than solitary business or residential end-users. Such customers accordingly are actively sought by new entrants who generally need to quickly develop a revenue base in order to have access to capital resources for further expansion.[6/] Access to these customers is thus crucial for any competitive entrant. Yet RCN has experienced great difficulties with such access, principally because ILECs and incumbent cable operators appear to use any opportunity to block entry by new competitors. At a recent hearing on inside wiring problems held by the House Subcommittee on Telecommunications, Trade, and Consumer Protection, numerous witnesses testified about the urgency and pervasiveness of the problem.[7/] RCN concurs fully with other industry representatives who have urged the Commission and the Congress to take more forceful action to open the "last 100 feet" to competition, as has been done in the case of the "last mile" in the context of section 251 of the Communications Act of 1934, as amended (hereinafter "Act").

Telecommunications: The Changing Status of Competition to Cable Television, GAO/RCED-99-158.

[5/] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 and CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, at ¶ 29 (rel. July 7, 1999) ("NPRM").

[6/] In its NPRM, the Commission acknowledges the essential need of a CLEC to garner revenue to support development of a facilities-based network. "The major economic obstacle to the development of competitive facilities-based networks . . . is the extensive investment necessary to duplicate the existing wireline networks." NPRM, at ¶ 19. Thus, it is not surprising that a CLEC must focus on areas in which it can make necessary financial gains to pay for its network.

[7/] *See* fn.4, *supra*.

The Commission has heretofore addressed inside wiring issues by bifurcating them into those raised in the Title II context and those raised in the Title VI context. As noted in the NPRM, significantly different rules exist in these two contexts.[8/] RCN has experienced difficulties in both contexts and urges the Commission to reemphasize Congress' competitive mandate for cable as well as telecommunications and to clarify a competitor's right to access inside wiring in MTEs regardless of the type of service being provided over the inside wiring. Such Commission action would effectuate the emergence of facilities-based, advanced service competition. As the Commission notes in its NPRM, Congress contemplated that a variety of technologies would compete with the ILEC's traditional telephone service.[9/] Adoption of rules that not only permit, but encourage, advanced, varied uses of inside wiring supports this Congressional intent.

A. Access to Telephone Inside Wiring

The Commission has adopted rules governing the installation, maintenance, and ownership of inside wiring.[10/] However, the Commission has not adopted rules to enable a

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[8/] NPRM at n.61, n.63.

[9/] NPRM, at ¶ 12.

[10/] In 1986, the Commission deregulated the maintenance of both complex and simple inside wire, and the installation of simple inside wire. It also precluded carriers from imposing restrictions on the removal, replacement, rearrangement or maintenance of inside wiring. *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Rcd 1190, 1195 (1986). Although the Commission's decisions did not change the ownership of inside wire, it gave building owners the right to control all aspects of the inside wire even if it had been installed by the ILEC. Moreover, sections 68.213 and 68.215 of the Commission's rules set forth specific technical standards to which carriers must adhere when

competitive telephone carrier to gain access to inside wiring. As demonstrated by the NPRM, numerous statutory provisions support the right of a telecommunications carrier to access inside wiring. The failure to establish such rules has allowed, and continues to allow, ILECs and building owners to abuse the vague and ill-defined regulatory environment. Such abuse inhibits the provision of competitive facilities-based services to residential or businesses end users in MTEs.

In the Title II context, RCN has been unable to reach numerous prospective customers due to ILEC control over cross-connects in MDUs. For example, in Massachusetts and New York, RCN has been struggling for some time with Bell Atlantic's inability to adequately provision house and riser cable.[11/] Until recently, Bell Atlantic did not even have a mechanized process in place to accept and provision orders for house and riser cross-connects. While Bell Atlantic now claims that it has such process in place, RCN has not noticed a difference in Bell Atlantic's ability to complete a request for house and riser cross-connect. This is due to Bell Atlantic's failure to train its technicians to perform cross-connects. Moreover, Bell Atlantic frequently fails to direct a technician to perform a cross-connect once the technician is on site,[12/]

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installing or maintaining simple and complex inside wire. 47 C.F.R. §§ 68.213, 68.215 (1998).

[11/] *See, e.g.*, RCN filing dated March 3, 1999 in New York State Public Service Commission Docket No. 97-C-0271.

[12/] Bell Atlantic has not established the proper methods and procedures for provisioning house and riser cable. In a recent grouping of fourteen house and riser dispatches, Bell Atlantic technicians performed only two correctly. It appears that when Bell Atlantic gives its technicians their orders, Bell Atlantic identifies the circuits but does not inform the technicians that they must perform the cross-connects. Thus, Bell Atlantic technicians do not know what to do once they are

which requires the technician to schedule yet another appointment, further delaying the end-users request. Bell Atlantic's technicians act as a bottleneck because they can handle only so many orders themselves, and Bell Atlantic forbids RCN from using its own technicians to perform cross-connects.

No valid reason exists to deny RCN the right to access the ILEC's cross connects in order to perform a change in MDU end-user service. It is a simple operation and does not pose a threat to the integrity or safety of Bell Atlantic's telephone network. Bell Atlantic has claimed that it would experience problems with its union if it allows CLEC technicians to place their own cross-connects to Bell Atlantic's house and riser cable. However, Bell Atlantic's technicians routinely work in the same building as Bell Atlantic technicians without incident. Moreover, to the extent that Bell Atlantic's collective bargaining agreement with the union forbids it from allowing other carriers to work on its plant, Bell Atlantic should not be able to make advantageous deals that stifle competition and present barriers to entry for CLECs. ILECs should be required to give properly trained CLEC technicians access to ILEC cross-connects and associated MTE wiring.

B. Access to Video Inside Wiring

The Commission has attempted to remedy the inaccessibility of cable competition for MTE end users through the adoption of complex video inside wiring rules.[13/] These rules,

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at the house and riser cable terminal block and simply close the order without performing the necessary cross-connect.

[13/] *See* 47 C.F.R. § 76.800-806; *See also, Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM

however, do not go far enough to compel fair access to inside wiring. Moreover, the complexity of the rules allows incumbent cable companies to create roadblocks. In the Title VI context, RCN has experienced major problems gaining access to MDU inside wiring and has previously brought its difficulties to the Commission's attention in numerous ways.[14/] The passage of time, however, has done nothing to alleviate the situation. More worrisome is the Commission's belief that its cable inside wiring rules have enhanced subscribers' ability to choose alternative providers of video service.[15/] Almost two years after adoption of elaborate home run wiring rules, relatively little cable competition exists in MDUs. In recently filed Initial Comments in the Commission's annual review of the status of competition in the video market, RCN emphasized the need for the Commission and its Bureaus to take an active role in implementing

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Docket No. 92-260, 13 FCC Rcd. 3659, ¶ 83 (1997), *recon. pending and appeal pending, Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Circuit)

[14/] *See*, e.g., *Annual MVPD Competition Review*, Docket 98-102, RCN's Initial Comments (filed July 31, 1998), at 13-16; RCN Request for Special Relief, Docket No. CSR 98-5311 (filed September 23, 1998); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No 99-230, RCN Comments (filed August 6, 1999) at 15-18. Some 10 months ago RCN sought an informal letter ruling from the Bureau with respect to the proper interpretation of the "demarcation point" concept as set forth in the Commission's inside wiring rules - an interpretation which, in RCN's opinion, would have materially assisted it in gaining access to hundreds of potential subscribers who were unreachable because the incumbent has refused to allow RCN access to its wiring. It should be emphasized that RCN was entirely willing to negotiate fair compensation terms with the incumbent, but in the face of a flat refusal to permit such access, RCN turned to the Cable Services Bureau for relief. Sadly, to date RCN has received no response whatsoever from the Cable Services Bureau.

[15/] NPRM, at ¶ 32.

the procompetitive policy of the 1996 Act.[16] Long delays in Commission resolution of important competitive disputes disserves the public interest. In an industry like telecommunications where revolutionary changes are underway both technologically and in the regulatory arena, the implementing agency must act quickly and decisively either to grant relief to potential competitors or to seek additional statutory authority, if the Commission believes that such additional authority is necessary. Inaction, or hesitant denials of authority serve only the interests of the incumbents who are invariably satisfied with their entrenched position and regard any change as adverse.

In almost every case in which RCN introduces its bundled cable/telephone/Internet service into an MDU, it prefers to install its own wiring because it is technically superior to the existing coaxial cable and because doing so gives RCN complete control over its costs. Most building owners give RCN permission to do so, but in some areas about one third decline such permission because of the disruption, noise, dust, and other adverse aspects of installing new wiring behind sheetrock walls or ceilings or in raceways in existing structures. In such cases, RCN cannot serve its potential subscribers unless it can gain access to the existing video wiring. Yet such access is virtually always denied even when RCN offers to pay reasonable fees to the incumbent for the purchase or lease of the wiring. RCN has experienced incumbent "lock-outs" in numerous MDUs, all based on the incumbents' assertion, frequently with no proof whatsoever,

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[16] Comments of RCN filed in *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, in CC Docket No. 99-230, August 6, 1999, pp. 27-29.

that they own the inside wiring,[17] or have a right to exercise dominion over the wiring under an agreement with the building owner and/or a state mandatory access law. In the Boston area, RCN's affiliate has often encountered such difficulties.[18] In the Washington, D.C. metropolitan area, Starpower, RCN's affiliate, has encountered instances in which the incumbent cable operator and the building owner or manager have entered into an exclusive service agreement, barring Starpower from providing service, even though its integrated four way service is broader, technically superior, provides more channels, and is less expensive than the incumbent's.

Simply stated, and as the NPRM itself recognizes,[19] access to the end-user in MTEs is inadequate in both the telephone and the cable context. That inadequacy is a serious gap in the pro-competitive policy adopted by the Congress both in the Cable Act of 1992 and the Telecommunications Act of 1996, and further articulated and enforced by the Commission. It is time – indeed, it is long since time – for more dramatic action.

III. THE COMMISSION SHOULD DEVELOP A UNITARY FEDERAL MANDATORY ACCESS POLICY

Today, the concept of "convergence" is neither novel nor disputable. In a recent Commission News release it was reported that the Chief of the Cable Services Bureau spoke

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[17] These assertions of legal ownership are often contested by the building owners/managers and in many cases, because of the passage of a decade or more since the wiring was initially installed, determination of legal title may be difficult or even impossible.

[18] In these circumstances, the incumbents give lip service to welcoming competition, but of course do everything in their power to make such competition impossible.

[19] NRPM, at ¶¶ 13 and 29.

publicly of the "emergence of convergence."[20/] It is useful to frame and articulate the issue in this fashion, but doing so is only the first step in translating the advances in technology into practical regulatory rules and regulations. RCN, whose business plan is virtually a living illustration of convergence, therefore urges the Commission to develop inside wiring policies and rules that express an overarching policy to compel those who own or operate inside wiring or the facilities or spaces in which such wiring is or can be installed, to make such wiring or facilities available on reasonable, nondiscriminatory, and equitable terms to all service providers regardless of the technology used or the regulatory category under with the provider operates. Such policy should require MTE owners or managers to open their facilities to any provider who wishes to offer service to the end-users in such structure. Moreover, the policy must be mandated at the federal level, and must preempt any conflicting or inconsistent state or local law, as well as superseding any inconsistent Commission rules.

A. A Federal Mandatory Access Requirement Impacting All Communications Providers

While the NPRM is addressed predominantly to Title II telecommunications issues, RCN urges the Commission to conceptualize the inside wiring issue more broadly, and to develop policy and a new set of regulations that are more broadly conceived than either the telephone inside wire rules or the video inside wire rules. The Commission must establish, as suggested in the NPRM, a federal mandatory access requirement (the "FMAR").[21/] This requirement should

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[20/] *See* n.1, *supra.*

[21/] *See* NPRM at ¶ 52; *see also* ¶¶ 55-56.

apply to ILECs, incumbent cable operators, MTE owners or managers, and to public utilities who own, operate, or control facilities within MTEs. The FMAR should be preemptive of contrary, conflicting, or inconsistent state law although states should be free to supplement the FMAR to meet local conditions or concerns. The FMAR should also supersede any current Commission rules that would frustrate its purpose.

RCN recognizes that this is a tall order and that it cannot be completed quickly. On the other hand the substantial percentage of residences, small businesses, home offices and other end-users who need access to modern telecommunications and are located within MTEs make the omission to establish such a broad preemptive federal policy a very serious gap in the pro-competitive national policy. Similarly, the "emergence of convergence" makes it essential that the inside wiring issues be considered on a unitary basis, rooted in basic and straightforward principles that apply to every context, are readily understood, and subject to efficient enforcement when the need arises. As set forth in section IV below, the Commission has ample authority under the Communications Act and applicable Supreme Court precedent to establish a FMAR.

The content of the FMAR is, of course, the heart of any federal policy mandating access to inside wiring. Rather than attempt to tailor the existing telephone inside wiring rules to the video inside wiring rules, or to construct elaborate, complex and yet incomplete rules, as the Commission has done in the case of video inside wiring, RCN suggests that the Commission use this stage of the instant rulemaking to articulate three fundamental and interlocking principles along with basic implementing rules and then consider and refine specific regulations in

subsequent stages of the proceeding. This approach will refocus and reorient all parties on basic principles but will also provide flexibility for the industries involved to develop new approaches to reach MTE end users.[22/]

In essence, these rules should reflect the following three principles:

- **End - User Principle**: MTE end-users should have a right to receive communications services from any entity which is willing to provide such service and has been properly certificated by duly constituted authority;
- **Services Provider Principle**: Entities wishing to serve MTE end-users, and who have the proper certification, should be able to do so either by the payment of a nondiscriminatory and reasonable fee to the owner of any existing inside wiring, facilities, conduits, or rights of way, or by installing new distribution facilities pursuant to agreement with the MTE owner/manager; and
- **MTE Owner Principle**: MTE owners should be obliged to provide building access to all duly certificated entities wishing to serve end-users, on nondiscriminatory and reasonable terms and conditions.

Each is briefly outlined and discussed below.

[22/] As the Commission correctly notes, "[t]he types of access that a competing telecommunications carrier needs in order to provide telecommunications service within multiple tenant environments may depend in part upon the technology a provider uses, the design of its network, and the nature of its service offerings." NPRM, at ¶ 34. Thus, the FCC must ensure that its rules do not favor one type of technology over another, but instead, should encourage all efficient, advanced forms of providing communications services to MTE end users.

1. End-User Principle

The "end-user principle" is intended to affirmatively establish the right of any end-user in an MTE to receive service from a service provider, without reference to, or irrespective of, the location of such end-user within an MTE. While this expectation of access to service is not alone sufficient to assure that any individual end-user will receive service (because there must be a provider willing and able to serve that end-user), nevertheless RCN believes that announcing and codifying such a policy will serve a number of important public policy purposes. Among other things, it will declare that MTE residents have a broad and comprehensive right to anticipate service, much like the right to universal service, which is currently enshrined in the Act as an important element of telecommunications policy.[23/] Its existence may shift, or at a minimum, contribute to the shifting of, the burden of persuasion, which now rests on an end-user who wishes to have service but is not currently able to get it for whatever reason. While this principle is the easiest of the three to set forth, it is also the most fundamental since it creates an expectation the fulfillment of which requires affirmative undertakings from both the service provider and the building owner/manager.

2. Services Provider Principle

This principle establishes the right of a properly certified carrier or provider to serve an end-user within an MTE either by buying or leasing existing inside wiring from the owner of such wiring, or by installing its own wiring based on agreement with the MTE owner or manager

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[23/] *See* 47 U.S.C. §§ 151 and 254.

or with the holder of any applicable rights of way. Plainly this is one of the three essential elements of the universal access to inside wiring concept. The Commission has itself alluded to the element of ensuring that competitors can access all consumers as essential to the development of competitive facilities-based networks.[24/] RCN recognizes that a multitude of interpretive difficulties and conceptual uncertainties are raised by this principle. For example, what constitutes nondiscrimination as between an early service provider in an MTE and a later provider can implicate all the complexities of cost allocation theory, interconnection, or collocation agreements in the Title II context. Overbuilding, which would require the MTE owner/manager to agree to the terms of such construction, may also present numerous complex issues of fairness. But as in the former principle, the establishment of the fundamental concept is an important first step to addressing the important issues presented.

3. MTE Owner Principle

As in the case of the first two, this principle sets forth an essential element in assuring that end-users in MTEs have access to modern telecommunications: the owner (or manager) of the MTE is under an affirmative duty both to permit end-users to receive such service and to permit providers to offer such service. Accordingly, while the property rights of the building owner or manager are entitled to be protected, that protection should lie not in the privilege of simply denying end-users access to service or providers access to end-users, but rather in the negotiation of reasonable and adequately compensatory terms and conditions for use of building

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[24/] NPRM, at ¶ 24.

facilities or space so that these parties can access each other. Indisputably the MTE owner/manager is entitled to fair compensation for the use of its building, for damages incurred in installing equipment, and perhaps for routine maintenance required to properly house the distribution plant.[25/] The MTE owner/manager should also be entitled to approve a provider's plans to ensure continued aesthetic appeal of the property. But the important principle should be established that MTE owners and managers are not permitted simply to refuse access to certificated service providers, nor to extract payment, of whatever sort, which is excessive, discriminatory, or unreasonable. Again, RCN understands that the basic principle is easier to state than to implement. What is crucial at this point, however, is precisely to state the principle, and then to undertake in further proceedings the task of detailing the manner in which these principles will be imposed.

In addition to the foregoing three principles, there are certain corollary concepts found in the Act that support these principles and must be addressed if the overall policy reflected in the principles is to be meaningful. RCN supports the Commission's suggestion that the various components of inside wiring, beginning at the NID, be considered network elements that must be unbundled and made available to CLECs. To the extent utilities have access (or the right to acquire such access) to facilities or spaces within MTEs, section 224 of the Act should be deemed to require utilities to assure the availability of such spaces or facilities to competitive

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[25/] As recently put by Congressman Markey in a Congressional hearing on inside wiring, "[A] balance has to be struck . . .[between building owners' interests and those of users because] we're also trying at the same time to drive a telecommunication revolution into every room that people in our country live in. . . ." *See* transcript, fn. 4 *supra*, at 36.

providers.[26] RCN urges the Commission to ensure that section 224 is not used to allow incumbent cable operators to enhance or extend their claim of ownership over inside wiring and, thereby, use section 224 in conjunction with the cable inside wiring rules to further strengthen their current impenetrable fortress.[27] Finally, exclusive contracts for the installation of inside wiring or access to such wiring must be prohibited, both for the future and for existing arrangements, which should be declared invalid. While there may be instances in which such exclusive arrangements were initially deemed necessary by a service provider or an MTE owner/manager, the achievement of full and free access to MTE end-users requires that such anti-competitive arrangements be terminated.[28]

As the Commission well knows, there are so-called "mandatory access" statutes in many states. In general these statutes give cable companies the right to install inside cabling over the objections of building owners/managers. RCN has discovered, however, that in many instances these statutes are used by incumbent cable companies to resist competitive entry. The

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[26] The NPRM declines to address the question whether owners of networks other than LECs should be required to make access to those networks available to third parties. *See* NPRM, par. 19 and n. 53. The question of public access to cable facilities is clearly outside the scope of this proceeding, but as suggested elsewhere herein, RCN urges the Commission to adopt a broad enough policy on inside wiring to assure that, *e.g.*, cable incumbents cannot block an MVPD's use of video inside wiring to an MTE subscriber when that subscriber wishes to switch service providers, provided, of course, that the incumbent, if it can demonstrate that it owns the wiring, is fairly compensated for such use.

[27] NPRM, at ¶ 47.

[28] It is occasionally suggested that absent such arrangements certain facilities would not be installed. Even if that rationale was valid in the past, it is no longer a sufficient basis to permit such an anticompetitive practice to inhibit the growth of competition.

Commission must declare state mandatory access laws that are inconsistent with the major principles outlined above preempted to the extent necessary.

Finally, recognizing that the adoption of the policies outlined above establishes important new principles and will constitute a significant shift in the Commission's approach to inside wiring issues, RCN recommends that the Commission accompany such new policies and regulations with a simplified, expedited, and, so far as possible, informal adjudicatory procedure. Such a procedure should assure that disputes can be heard by the Commission with a minimum of formality, close supervision of discovery if necessary, a proactive participation of Commission staff to attempt to arbitrate differences, and, most important, a schedule which contemplates that, except in the most extraordinary cases, a dispute will be resolved in the administrative forum within 90 days of the date of its initiation. In RCN's experience, the incumbent, or the party that does not want to change the status quo, is almost always able to stonewall any request for cooperation with the expectation that a determination of the parties' respective rights will be so expensive and so drawn out that the innovator, new entrant, or additional competitor will forego pursuing its opportunities rather than commit the resources and time to securing administrative assistance. Such anti-competitive tactics and expectations must be frustrated.

B. Telephone Inside Wiring Rules vs. Cable Inside Wiring Rules

There currently exist two sets of inside wiring rules, one devoted to telephone inside wiring and the other to video inside wiring.[29/] The Commission stated in the NPRM its intent to

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[29/] 47 C.F.R. §§ 68.213, 68.215 (telephone inside wiring rules); 47 C.F.R. §§ 76.800 -76.806 (cable inside wiring rules).

ensure that its "own rules and practices do not unnecessarily inhibit carriers from developing competitive networks."[30/] RCN submits that the current inconsistent rules do in fact prevent carriers from freely developing advancements in technology and combining and creating new services. As suggested above, RCN urges the Commission to develop a single, unitary policy applicable to all service provides regardless of the provider's technology.

In the NPRM, the Commission alludes to the cable inside wiring rules and notes that some parties have suggested the principles adopted by the Commission in the cable context should be ported to the telephone inside wiring rules so as to provide greater opportunity for the telephone service provider to take advantage of the rights established for cable providers in the cable inside wiring rules.[31/] There are two serious deficiencies in this approach, however. First, the cable inside wiring rules are extremely complex and convoluted. Even worse, RCN, which serves hundreds of MDUs and has brought its fiber optic plant to many buildings it cannot serve because the incumbent will not share the existing wiring, knows of no instance in which those rules have been sufficient to provide relief. Accordingly, while the cable inside wire rules may appear to provide greater competitive opportunities than the telephone inside wiring rules, RCN's experience is that there is little if any practical advantage to the cable rules.

Moreover, an attempt to rewrite the telephone inside wiring rules in the image of the cable rules, because of the complexity of both sets of rules, will divert significant Commission

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[30/] NPRM, at ¶ 27.

[31/] NPRM at ¶¶ 68 - 69.

resources into a task that RCN believes is fundamentally diversionary. More important than tinkering with two elaborate sets of rules is to declare broad principles by the adoption of minimal implementing rules followed by the rapid implementation of such principles through efficient, case-by-case administrative adjudication, elimination of inconsistent Commission rules, and preemption of conflicting state law to the extent it stands as a bar to the achievement of the procompetitive purposes of the Telecommunications Act of 1996.

Finally, the attempt to merge, or consolidate, even in part, policies and rules for telephone and video inside wiring perpetuates the very distinction that is rendered anachronistic by convergence. RCN epitomizes the need to overcome shop worn pigeon holes in addressing national communications issues. As noted, RCN provides four major services on one fiber optic pipe: local and long distance telephony, high speed Internet access, and broadband video services. When RCN, with its four-way service, approaches an MTE owner or manager, it should be able to achieve access for all of its services, without having to find the applicable principles in different rules, or to contend with the incumbent or the building owner/manager as to which service is predominant, higher priority, or more crucial. The only way to overcome these arbitrary distinctions is to develop relatively simple policies that are procompetitive without reference to service categories. Accordingly, the attempt to import certain specific rules from cable inside wiring rules to telephone inside wiring rules, even if it were useful in a narrow sense, would only perpetuate the constraints of arbitrary service categories, and narrowly focused administrative remedies, which confound, rather than advance, the provision of integrated services to the MTE end-user.

IV. THE COMMISSION HAS AMPLE AUTHORITY TO DEVELOP THE INSIDE WIRING POLICY RECOMMENDED HEREIN

Due to the slow emergence of facilities-based competition, the Commission is continually called upon to adopt rules and policies to make the competitive mandates of Title II and Title VI a reality. The Commission has broad authority pursuant to section 4(i) of the Act[32/] to adopt such rules or policies, not otherwise inconsistent with law, as it deems necessary to implement the provisions of the Act. RCN submits that its proposed policies described above are necessary to ensure the development of end-to-end, facilities-based competition and to ensure that no American is denied access to advanced communications services.

Section 4(i) provides, in part, that the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." In the Supreme Court's recent decision interpreting the Telecommunications Act of 1996, the Court explained that:

> the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that "the Commission may prescribe such rules and regulations as may be necessary to carry out the provision of this Act.[33/]

The 1996 Act directs the Commission to break up local monopolies and to bring competition to local markets. Thus, the Commission is empowered to use every provision of the Act in order to fulfill this mandate including Section 4(i).

[32/] 47 U.S.C. § 154(i).

[33/] *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, at n.5 (1999).

The Commission has already taken action affecting in-building facilities in order to fulfill its responsibilities to foster competition. When adopting its cable inside wiring rules, opposing parties argued that the forced disposition of cable home run wiring goes beyond the narrow language of §§623(b) and 624(i) of the Act, which do not encompass the sale of such wiring and restrict the Commission's authority to cable home wiring. The Commission sharply rejected these arguments, relying on its authority under §§ 4(i) and 303(r):

> We conclude that the Commission has authority under §§ 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly § 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. The Commission may properly take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions. We invoke § 4(i) here because, contrary to the arguments posed by some commenters, the Communications Act does not prohibit the Commission from adopting procedures regarding the disposition of home run wiring and because adopting such procedures is necessary to implement several provisions of the Communications Act by effectuating and broadening the range of competitive opportunities in the multichannel video distribution marketplace.[34/]

Similarly, RCN's proposal is not expressly prohibited by the Act and, furthermore, it is necessary to effectuate the competitive cable and telecommunications mandates of the Act.

The failure of Congress to explicitly direct the Commission to implement mandatory access requirements with respect to in-building facilities is no failure at all. Congress cannot

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[34/] *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM Docket No. 92-260, 13 FCC Rcd. 3659, ¶ 83 (1997) ("*Inside Wiring Order*"), *recon. pending and appeal pending, Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Circuit).

possibly foresee all potential problems in such a diverse, evolving industry. Instead, it has ensured that necessary action will be taken by the Commission to fulfill its mandates since the Act provides broad ancillary power to the Commission. The Commission's authority – and even obligation – to rely on its ancillary powers when unforeseen circumstances arise is reinforced in two cases arising in the U.S. Court of Appeals for the D.C. Circuit. In one case, the Commission had charged license fees to an applicant falling outside the class of applicants for which such fee authority had been granted by Congress.[35/] MTEL contended before the court that Congress' explicit grant of authority to collect fees for auctioned licences meant that the Commission lacked authority to impose feels in other contacts. The court, however, rejected this argument, finding that the "expressio unius" maxim was misplaced since it has little force in the administrative setting where deference to an agency's interpretation of a statute is appropriate unless Congress has directly spoken to the precise question at issue.[36/]

In the MTEL proceeding, the Commission contended that imposing a license fee on the grantee of a pioneer's preference fell within the Commission's broad authority under § 309(a) of the statute to assure that application grants were in the public interest because otherwise MTEL would be unjustly enriched and could indulge in predation in competing with auction winners who were forced to pay for licenses.[37/] Similarly, in *New England Telephone & Telegraph Co. v.*

[35/] *Mobile Communications Corp. (MTEL) v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 81.

[36/] *See id.*, 77 F.3d at 1404-5.

[37/] *Id.*

FCC,[38/] the Court sustained the imposition of a refund obligation on carriers for certain charges that produced revenue in excess of an authorized rate of return, even though the Act's only provision explicitly mentioning refunds did not apply to the circumstances. The Court found that refunds were necessary to remedy the violation of the Commission's rate of return order.[39/]

The 7th Circuit has also confirmed that "Section 4(i) empowers the Commission to deal with the unforeseen - even if that means straying a little way beyond the apparent boundaries of the Act - to the extent necessary to regulate effectively those matters already within the boundaries."[40/] In its *Inside Wiring Order*, the Commission concluded that it has authority under §§ 4(i) and 303(r) to establish disposition procedures for home run wiring because it is "necessary" to the execution of the Commission's functions.[41/] In doing so, the Commission emphasized the latitude courts have given the Commission to adopt appropriate and reasonable measures, and to exercise its expert judgment.[42/] RCN is simply asking that the Commission similarly exercise its authority to remedy circumstances which prevent fulfillment of Congress' vision of competitive cable and telecommunications markets.

[38/] 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).

[39/] *Id.* 826 F.2d at 1107-09.

[40/] In *North American Telecommunications Association v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985), the Commission, relying on § 4(i), required the Bell holding companies to file capitalization plans for equipment subsidiaries, although the Communications Act conferred no authority over holding companies and the legislative history suggested that Congress had considered and rejected such authority.

[41/] *See* fn.34, *supra*.

[42/] *Id.*

The Commission has ample authority to apply the same set of inside wiring principles to Title II carriers as to Title VI providers. In the NPRM, the Commission emphatically states its support for applying "uniform rules governing access to inside wiring regardless of a provider's service technology or the form of its authorization."[43/] Thus, regardless of what title a communications service provider operates under, its access to inside wiring should be regulated the same way.

The application of uniform rules is not a revolutionary idea. Competitive concepts apply in the same manner to the cable industry as to the telecommunications industry. Furthermore, as "emergence of convergence" advances, more and more cable companies will provide telecommunications and vice versa. Thus, some entitles already operate under Title II as well as Title VI regulations. Rather than conforming to the type of carriers (Title II or Title VI), the Commission's regulations should focus on the activity being regulated -- access to in-building facilities. The Commission has already acknowledged its authority to regulate inside wiring and is now being called upon to extend such regulation in a manner that will effectuate competitive entry. RCN is not asking the Commission to conflate Title II and Title VI. Rather, RCN is simply recommending that the same set of principles for access to inside wiring be applicable to telecommunications providers and cable providers. It is only sensible that regulations under each Title should be equitable when the activities under each Title are converging or indeed are converged.

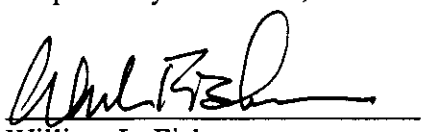
[43/] NPRM, at ¶ 68.

V. CONCLUSION

RCN recognizes that the sweeping revision of the Commission's inside wiring rules that is recommended in this submission is easier said than done. On the other hand, getting it done is one of the fundamental necessities for the implementation of Congress' pro-competition policy. Tinkering around the edges is not adequate; the 30% of the public that is largely cut off from the benefits of competition will grow over time, and a greater proportion of the economy's productive activity will be occurring in the competition-deprived MTEs. RCN believes the Commission has ample authority to adopt the policies set forth in these initial comments, for the reasons outlined above. But the limits of the Commission's authority under existing law cannot be ultimately determined by the Commission. While it must, of course, act responsibly in adopting rules which it believes are within the scope of its existing mandate, it need not hesitate to take an expansive view of that authority, as it has done on so many occasions in the past. If it does so the courts will, in due course, make a final determination about the correctness of the Commission's view. But if, on the contrary, the Commission shrinks from an assertion of jurisdiction because such assertion is controversial or may be challenged, there is no remedy for the parties damaged or discouraged by such hesitancy, other than to seek legislation -- always a time consuming and uncertain task. Accordingly, if the Commission believes that a respectable argument for asserting jurisdiction exists, it should proceed, even if the matter is not entirely free

of doubt. If it concludes, on the other hand, that it lacks authority to take the steps recommended, it should promptly and formally request the grant of such authority from the Congress.

Respectfully submitted,



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August 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 27th day of August, 1999, to the following:

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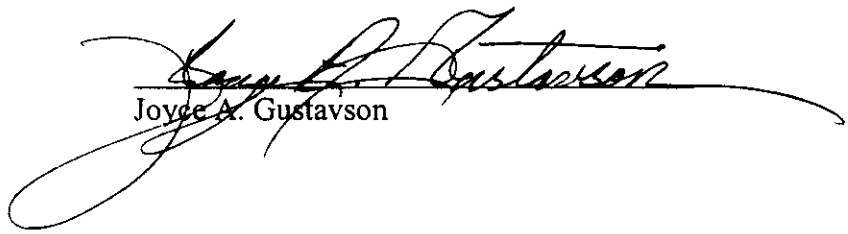

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